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SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1955**

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**No. 734**

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MARCO REGINELLI,

*Petitioner,*

*v.*

UNITED STATES OF AMERICA

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**PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY**

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# SUPREME COURT OF THE UNITED STATES

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**No.**

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MARCO REGINELLI,

*Petitioner,*

*v.*

UNITED STATES OF AMERICA

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## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY

The petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of New Jersey reversing a judgment of the County Court of Atlantic City granting petitioner American citizenship.

### Opinions Below

The opinion of the Supreme Court of New Jersey is reported at 119 A. 2d 454, and is set forth at page 24 of the Appendix herein. The opinion of the County Court of Atlantic City is reported at 116 A. 2d 214, 36 N. J. Super. 455, and is set forth at page 14 of the Appendix herein.

### Jurisdiction

The judgment of the Supreme Court of the State of New Jersey was entered on January 3, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

## Questions Presented

1. Do state appellate courts have unqualified and greater powers to set aside judgments of naturalization than federal courts of appeal, and if they do, are such powers consistent with the Constitutional provisions limiting Congress to the establishment of a uniform rule of naturalization?

2. Where citizenship has been granted to an alien by a state trial court, may a state appellate court set aside such judgment by review of the facts upon the ground that it would reach a different result or must it be established that an error of law has been committed?

3. Where citizenship has been granted to an alien by a state trial court, may a state appellate court set aside such judgment in the absence of clear and convincing evidence that citizenship was erroneously granted?

4. May a state appellate court reverse a trial court's judgment granting an alien American citizenship by reviewing matters of fact and without giving appropriate weight to the discretion and findings of the trial court?

5. Under the Nationality Act of 1940 which requires five years good moral character, is an alien's conduct outside the five year period material in determining his qualifications?

## Constitutional and Statutory Provisions Involved

Article I, Section 8, Clause 4 of the Constitution provides:

> "The Congress shall have power . . . to establish an uniform Rule of Naturalization . . ."

Section 301(a) of the Nationality Act of 1940 (8 U.S.C. 701(a); 54 Stat. 1140) provides:

"Exclusive jurisdiction to naturalize persons as citizens of the United States is hereby conferred upon the following specified courts: District Courts of the United States now existing . . . Also all courts of record in any State or Territory now existing . . . having a seal, a clerk, and jurisdiction in actions at law or equity . . . in which the amount in controversy is unlimited."

Section 307 of the Nationality Act of 1940 (8 U.S.C. 707; 54 Stat. 1142) provides in pertinent part:

"(a) No person . . . shall be naturalized unless such petitioner, (1) immediately preceding the date of filing petition for naturalization has resided continuously within the United States for at least five years . . . and (3) during all of the periods referred to in this subsection has been and still is a person of good moral character. . . ."

## Statement

Petitioner, Marco Reginelli, a native of Italy and unmarried (R. 1a), came to the United States for permanent residence on June 4, 1914, and has never left the United States since then (R. 9a). Prior to 1942 he was convicted on five occasions. His record consists of a 1920 fine for a liquor violation, a 1924 fine for indulging in a suspicious card game, a 1933 fine for aiding in a lottery, a 1926 sentence for a year for fraudulent conversion, and a six month sentence for violation of the Mann Act (R. 62a-63a).

Since 1942 there has been no arrest record concerning Reginelli (R. 63a, 71a). It is undisputed, and the Naturalization Examiner of the Immigration Service so found, that there is no evidence "other than hearsay or rumor connecting petitioner with any illegal business within the statutory period" (R. 71a, Finding g).

### (A) *Proceedings Before the Naturalization Examiner and in the Trial Court*

After petitioner filed his application for naturalization in the court below on September 23, 1952 (R. 3a), both he (R. 6a) and his witnesses (R. 104a) testified under oath before a naturalization examiner in 1953, pursuant to 8 Code of Federal Regulations 373.1 (1949 Ed.).[1] The two witnesses certified to petitioner's good moral character during the past five years (R. 4a, 104). Petitioner testified that his income was derived from the Forest Products Company, a plastic concern, from rents, from Government bonds, and from wagers placed at various race tracks (R. 30a-35a). Petitioner's income tax returns for five years were submitted to the Immigration and Naturalization Service for examination (R. 31a, 32a). There is no dispute that he disclosed his race-track winnings in these returns. He testified below that the approximate range of his bets was sometimes $50 to $300 and sometimes in the thousands (R. 34a-35a). When asked to name a horse upon whom he had bet successfully, the place, and the amount, petitioner stated that he would bring the race track programs which he had at home indicating this information. Petitioner was requested to give them to his attorney, then Mr. Di Bona, or mail them in (R. 35a). This was in 1953 (R. 6a). Thereafter deportation proceedings were instituted against petitioner, and the naturalization proceedings were stayed until the deportation warrant was dismissed. Mr. Di Bona was replaced by Mr. Schofield as attorney, and the naturalization proceeding was resumed in 1955 when findings were made by the naturalization examiner (R. 87a, 88a, 72a). The naturalization examiner, however, had stated that his findings would not be made

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[1] The present application filed prior to the effective date of the Immigration and Nationality Act of 1952, is controlled by the 1940 Nationality Act. *United States* v. *Menasche*, 348 U.S. 528 (1955).

until the race track programs had been submitted (R. 60a). In the confusion caused by the intervening deportation proceedings, the lapse of two years, the change of attorneys, and the representation that no findings would be made until the race track programs were submitted, these programs were not submitted (R. 87a).

The findings of the naturalization examiner submitted to the Court below recommending denial of the petitioner's application were based upon his poor reputation and his failure to adequately explain his annual income and the unsupported conclusion that petitioner's income was derived from illegal sources (R. 71a, 72a; Findings of Fact e, g, j, k).

At the trial below the naturalization examiner admitted that petitioner had not been in any difficulty during the last five years and that he was currently leading a quiet life (R. 74a). An unsuccessful attempt was made to introduce newspaper clippings to prove petitioner's alleged bad reputation (R. 75a-76a). The naturalization examiner conceded that the sole issue was whether petitioner's statements as to his income from race track wagers were credible (R. 81a-82a, 90a). All other objections were specifically waived (R. 82a).

The trial court in its written opinion held (R. 100a);

> "The itemized list of arrests end in 1942. The itemized list of 1953 newspaper references resulted from deportation proceedings instituted at that time against petitioner and reflect a prior reputation rather than a current one.
>
> "A search of the entire brief does not contain a scintilla of actual or real evidence that the petitioner, since 1942, has engaged in any illegal enterprise or been involved in any misconduct of the type that creates his former bad reputation. In fact, the government submits that since 1942 there has been no arrest

record, and that he is apparently living in a very quiet manner, and that any conclusions by the government regarding illegal gambling, etc., are the result of rumor and hearsay. It would appear that the investigative facilities available to the service most certainly would have revealed any misconduct of this petitioner who, evidently, has been the object of very close scrutiny since 1942. In the absence of actual proof it would be a miscarriage of justice to resort to rumor and hearsay or even unsupported circumstantial evidence to create a present bad reputation and poor moral character on one acquired some years prior to the statutory period in this matter."

The trial court found further that (R. 93a, 105a):

"* * * not a shred of evidence has been produced to support a conclusion that this man is withholding necessary information from the Government and from this Court.

* * * * * * *

"The petitioner has claimed, under oath, that the difference between his listed income and income tax declaration has been made from wagering on horses at the various race tracks. The Federal Examiner contends that this is incredible and not worthy of belief, and that this Court should assume that the difference in the two sums is secured illegally. It is not within the province of this Court to speculate or guess on an essential fact nor is the Court so skilled as to determine the expertness of the petitioner in being able to accrue such winnings and profits by legal betting at legally established race tracks, two of which are in operation in the immediate vicinity wherein the petitioner resides."

### (B) *The Decision Below*

The Supreme Court of the State of New Jersey certified the instant case to itself (Appendix, p. 25) by-passing the Appellate Division, and reversed the grant of American citizenship, finding Reginelli's testimony incredible although the trial court had reached a contrary conclusion. In so doing the Supreme Court of New Jersey acknowledged that it considered Reginelli's record prior 1942 material and that it was reviewing findings of fact of the trial court and substituting its own for that of the County Court. (Appendix, p. 31).

## Reasons For Granting the Writ

1. The Supreme Court of New Jersey reversed and revoked the citizenship granted petitioner by the County Court of Atlantic City by reviewing the evidence and reaching a different conclusion on the facts. No federal statute regulates state naturalization appeals. Under the practice in New Jersey as revealed by its judicial decisions, the Supreme Court of New Jersey, although an appellate tribunal, is authorized to reverse a lower court and enter new findings of fact. In New Jersey "appellate review of matters of fact, as well as law, is authorized." *Colacurcio Contracting Corp.* v. *Weiss*, 119 A. 2d 449, 453 (1955). Unlike federal appellate courts which are limited to setting aside District Court findings only where they are clearly erroneous, Rule 52(a) of the Rules of Civil Procedure; *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 365 (1947); *Troyak* v. *Enos*, 204 F. 2d 536 (C.A. 7, 1953), the scope of state appellate review ranges from complete review of the evidence in some jurisdictions [2] to

[2] In addition to New Jersey, appellate review of the evidence is authorized in Michigan, *Bentley* v. *Caille*, 289 Mich. 74 (1939); Illinois, *Feucht* v. *Clarke*, 299 Ill. App. 477 (1939); and Washington, *Darnell et ux.* v. *Noel et ux.*, 34 Wash. 2d 428 (1949).

those in which review of questions of fact are prohibited.[3]

It thus appears that if the practice followed herein is sanctioned granting state appellate courts unlimited jurisdiction to review naturalization judgments, an alien naturalized in a state court in New Jersey is treated unlike one so naturalized in Connecticut and still different from anyone naturalized in a federal court. In each case the scope of appellate review is different. In each case citizenship is subject to revocation upon varying standards. In *Bindczyck* v. *Finucane*, 342 U.S. 77 at 85, 87 (1951), this Court observed that there were "wide and whimsical diversities revealed by the local laws of the forty-eight States in the power of their Courts to set aside local judgments" and that there was a "Congressional concern for unity in post-naturalization proceedings." This Court has likewise observed that where the policy of the law is so dominated by the sweep of a federal statute, legal relations which they affect must be governed by federal law having its sources in these statutes rather than by local law.[4] *Garrett* v. *Moore-McCormack Co., Inc.*, 317 U.S. 239 (1942); *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U.S. 173 (1942); *Board of Commissioners* v. *United States*, 308 U.S. 343 (1939); *Royal Indemnity Co.* v. *United States*, 313 U.S. 289 (1941). It is not to be inferred therefore, that Congress in the enactment of the 1940 Nationality Act nor in its successor, the Immigration and Nationality Act of 1952[5] authorized state appellate courts to review citizenship decrees and denationalize those to whom citizenship had been awarded upon any different basis than that sanctioned by

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[3] *Farkas* v. *Halliwell*, 136 Conn. 440 (1950); *Kelly* v. *Dickerson*, 213 Ind. 624 (1938).

[4] "This uniformity requirement extends to the type of proof necessary for judgment." *Garrett* v. *Moore-McCormack Co., Inc.*, 317 U.S. 239 at 244 (1942).

[5] 8 U.S.C. 1421 continues the jurisdiction of state courts to naturalize aliens.

federal appellate tribunals. For a contrary conclusion would lead to the view that Congress has abandoned the constitutional mandate to establish "an uniform Rule of Naturalization."

The issue presented herein as to the power and scope of state appellate review of naturalization decrees is an important issue in the administration of our nationality laws and one of continuing concern under the Immigration and Nationality Act of 1952. Equally important is the necessity of deciding whether our naturalization laws are to have uniform application throughout the United States and whether such uniformity extends to the type of permissible appellate review.

2. Petitioner has been deprived of citizenship granted to him by the County Court of Atlantic City merely by reason of the fact that the Supreme Court of New Jersey reached a different conclusion upon the facts herein. Although the naturalization court exercises a wide discretion in the grant of citizenship, *Marcantonio* v. *United States*, 185 F. 2d 934, 937 (C.A. 4, 1950), the Court below gave no weight to such discretion exercised in favor of petitioner. Thus, petitioner has been deprived of citizenship even though clear, convincing and unequivocal evidence does not sanction such deprivation. Whether such standard of proof, required in denaturalization cases, *Schneiderman* v. *United States*, 320 U.S. 118 (1943); *Baumgartner* v. *United States*, 322 U.S. 665 (1944); *Gonzales* v. *Landon*, 350 U.S. 920 (1955), should have been applied by the Supreme Court of New Jersey is an issue which merits review by this Court. The effect of the decision below is revocation of citizenship, and revocation of citizenship under this Court's decisions requires such standard of proof.

3. The Court below acknowledged that the Second, Fifth

and Seventh Circuits have held that conduct outside the five year statutory period is immaterial in determining good moral character under the Nationality Act of 1940. *United States* v. *Clifford*, 89 F. 2d 184 (C.A. 2, 1937); *Petition of Zele*, 127 F. 2d 578 (C.A. 2, 1942); *United States* v. *Rubia*, 110 F. 2d 92 (C.A. 5, 1940); *Application of Murra*, 178 F. 2d 670 (C.A. 7, 1949). However, the Court below elected to resolve the conflict in circuits by following the contrary view which it believed was espoused by the Fourth and Eighth Circuits in *Marcantonio* v. *United States*, 185 F. 2d 934 (C.A. 4, 1950), and *Ralich* v. *United States*, 185 F. 2d 784 (C.A. 8, 1950). This conflict of circuits presents an important issue which should be determined by this Court. Not only are many naturalization cases still pending in the courts under the 1940 Nationality Act, but as this Court will observe from *United States* v. *Anastasio*, 226 F. 2d 912, 919 (C.A. 3, 1955), certiorari pending (No. 691, October, 1955 Term), many citizenship revocation cases have been instituted under the Justice Department's deportation and denaturalization program. These cases are likewise concerned with the issue as to whether a naturalized citizen was of good moral character during the statutory five year period prescribed by the 1940 Nationality Act where misconduct existed outside such period. Accordingly, it is desirable that the conflict presented by the circuits be resolved by this Court.

## Conclusion

The decision below presents issues of importance in the administration of our naturalization laws and involves conflicting views of Circuit Courts of Appeal. It is therefore submitted that the petition for a writ of certiorari should be granted.

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# APPENDIX

## ORDER OF COURT GRANTING CITIZENSHIP

(Filed June 21, 1955)

Order No. 1

ORDER OF COURT

STATE OF NEW JERSEY,
County of Atlantic, ss.

*In the County Court of Atlantic County*
*at Mays Landing, N. J.*

Upon consideration of the petitions for naturalization recommended to be denied, listed on List No. 2 sheet(s) 1 to ..... dated ....., 19 ...., presented in open Court this ..... day of ....., A. D., 19 ...., IT IS HEREBY ORDERED that each of the said petitions, except those petitions listed below, be, and hereby is, denied.

IT IS FURTHER ORDERED that the recommendation of the designated examiner is disapproved as to the petitions listed below, and each of said petitioners so listed having appeared in person in open Court this 21st day of June, 1955, and each having taken the oath of allegiance required by the naturalization laws and regulations, IT IS HEREBY ORDERED that each of them be, and hereby is, admitted to become a citizen of the United States of America.

IT IS FURTHER ORDERED that prayers for change of name listed below be and hereby are granted, except as to Petition(s) No. .....

| Petition No. | Name of Petitioner | Change of Name |
|---|---|---|
| 9291 | Marco Reginelli | |

By the Court, this 21st day of June, 1955.

GEORGE T. NAAME,
*Judge.*

DARK PAGE BLEED THRU

FOR THE COUNTY OF ATLANTIC
MAYS LANDING, NEW JERSEY

In the Matter of the
PETITION OF MARCO REGINELLI,
No. 2186-P-9291, for
Naturalization

OPINION

(Filed July 20, 1955)

NAAME, J. C. C.

The final hearing of the petition for naturalization of one Marco Reginelli came before this Court on June 21, 1955, at Mays Landing, Atlantic County, New Jersey. Prior to this hearing briefs were submitted to this Court by Herbert M. Levy, Esquire, the designated Federal Examiner for the Immigration and Naturalization Service, and Lemuel B. Schofield, Esquire, John B. Brumbellow, Esquire, and Edward I. Feinberg, Esquire, counsel for the petitioner. Both briefs contained a most adequate treatment of the subject matter and revealed exhaustive research as to the applicable authorities on the law at issue. This Court carefully considered all of the facts presented and examined in detail all the authorities noted in the briefs, in addition to related cases not mentioned in the written arguments.

On the date of the hearing counsel for the government, in open court, abandoned all (except one) contentions contained in the government Findings and conceded that they were without merit, except point (j) in paragraph 4 under Statements of Fact (a) to (k) inclusive, which charges "that the petitioners accounting for this large income is not believeable, and leaves the source of this income unexplained". These admissions reduce the issues in this matter to one single challenge.

In addition to the foregoing the government also concedes:

(1) That the Nationality Act of 1940, Section 307 (a) applied to the petitioner and that the Immigration and Nationality Act of 1952 did not apply. Section 307 (a) of the Nationality Act of 1940, the section of the law under which this petition was filed, reads as follows:

> "No person, except as hereinafter provided in this Act, shall be naturalized unless said petitioner (1) immediately preceding the date of filing petition for naturalization has resided continuously in the United States for at least five years and within the State in which petitioner resided at the time of filing the petition for at least six months, (2) has resided from the date of the petition up to the time of admission to citizenship, and (3) during all the periods referred to in this sub-section has been and still is a person of good moral character". (54 Stat. 1142, 8 U. S. C. 707)

A recent case, *U. S.* v. *Cunha, 209 F. 2d, 326,* supports this view and holds that:

> "The Immigration and Nationality Act, 66 Stat. 163, 8 *U. S. C. A. s.* 1101 *et seq.*, passed by Congress on June 27, 1952, went into effect with an exception not here material 180 days thereafter. Section 405 (b) of the Immigration and Nationality Act (1952) catagorically provides that except as otherwise specifically provided in its Title III, 'any petition for naturalization heretofore filed which may be pending at the time this act shall take effect shall be heard and determined in accordance with the requirements of law in effect when such petition was filed'. And although Congress saw fit to provide specifically that Sections 313 and 315 of Title III forbid, respectively, the naturaliza-

tion of persons who, broadly speaking are, or are likely to be violently opposed to our form of government, or who claim alienage to avoid military service, shall apply as of the applicable date of the Act notwithstanding the provisions of Section 405 (b), Congress did not see fit to make a like specific provision in Section 316 wherein five years residence immediately preceding petition for naturalization and "good moral character" during such residence, are made conditions precedent to naturalization. Thus we are not concerned with "good moral character" as that phrase is defined and detailed in Section 101 (f) of the Immigration and Nationality Act. Instead we are concerned with "good moral character" as that phrase was used without any attempt at precise definition in Section 307 (a) of the Nationality Act of 1940".

(2) That the authorities are unanimous in the opinion that character is not synonymous with reputation, since character refers to what a person really is and not what he is supposed to be.

In *Ralich* v. *United States*, 185 F. 2d 784 (CA 8th 1950), the court said (786):

"It is first worthy of note that the statute does not prescribe as a condition for naturalization that the applicant be a person of good repute, but that during that period he shall be a person of good moral character. Character implies merely qualities which belong to and distinguish an individual person. It signifies the reality as distinguished from reputation or the opinion generally entertained of him . . . In Sloan v. United States, supra, Judge Stone, speaking for this court said: 'Character is what a man really is. Reputation is what the general run of people who know him think he is'."

To the same effect see:

*In Re Bonner*, 279 F. 789, D. C. Mont. (1922);
*In Re Capozzi*, 160 Misc. 200, 289 N. Y. S. 869 (1936);
*In Re United States* v. *Hrashy*, 240 Ill. 560, 88 N. E. 1031 (1909).

(3) That all references in the government's argument relating to the petitioner's arrest and bad moral character prior to the stipulated period of five years immediately preceding the filing of the petition up to and including the final date of hearing, are merely used for background purposes and are conceded to be without merit regarding the law at issue in this matter. The government admits further (a) "that there is no record of arrests concerning the petitioner since 1942" (b) "that there is no evidence other than hearsay or rumor connecting the petitioner with any illegal business within the statutory period" (c) "he is apparently living in a very quiet and retiring manner".

This Court is concerned with the term "good moral character", its meaning, definition and application in this hearing. The government contends that the requirements under the 1940 Act are not easily defined and that standards of morality may vary at different times and in diverse regions. The Court agrees with this view and notes that a careful perusal of the submitted brief reveals that, in substance, it deals with what this petitioner is supposed to be at present based on his reputation in the past. The itemized lists of arrests end in 1942. The itemized list of 1953 newspaper references resulted from deportation proceedings instituted at that time against the petitioner and reflect a prior reputation rather than a current one.

A search of the entire brief does not contain a scintilla of actual or real evidence that the petitioner, since 1942, has engaged in any illegal enterprise or been involved in any misconduct of the type that created his former bad repu-

tation. In fact the government submits that since 1942 there has been no arrest record, that he is apparently living in a very quiet manner, and that any conclusions by the government regarding illegal gambling, etc., are the result of rumor and hearsay. It would appear that the investigative facilities available to the service most certainly would have revealed any misconduct of this petitioner who, evidently, has been the object of very close scrutiny since 1942.

In the absence of actual proof it would be a miscarriage of justice to resort to rumor and hearsay or even unsupported circumstantial evidence to create a present bad reputation and poor moral character on one acquired some years prior to the statutory period in this matter.

To return to "good moral character" and its application, Section 307(a) of the statute with which we are concerned, as we have already noted, does not make any attempt to define "good moral character" with any degree of precision but leaves that at large for determination in each case as a matter of fact.

See:

*Daddona* v. *United States*, 2 Cir. 1948, 170 F. 2d 964.

In *United States* v. *Cunha, supra*, Cir. 1954, 209 E. 2d 326 at 329, it was held that:

> "Although we may concede that conviction of a crime, particularly if it be a felony involving moral turpitude, is strong evidence of bad moral character, nevertheless we think that if Congress in 1940 had intended to make the commission of such a crime an absolute bar to naturalization it would have said so, as it made commission of a felony or misdemeanor involving moral turpitude a bar to the admission of aliens in the Immigration Act of 1917, 39 Stat. 875, and still does as to some kinds, 66 Stat. 182, and as it did later in specific detail in 1952 with respect to natu-

ralization in Section 101(f) of the Immigration and Nationality Act. The absence of such specific provision in the 1940 Act we think makes it evident that at the time Congress must have intended by using general language to establish an elastic test for good moral character (See *Schneiderman* v. *United States*, 1943, 320 U. S. 118, 139, 63 S. Ct. 1333, 87 L. Ed. 1796), and having done so it is not our province to limit the generality of its language by adding to the statutory requirement a rigid limitation with respect to commission of crime. See *Tutun* v. *United States*, 1 Cir., 1926, 12 F. 2d 763, 764."

In *Daddona, supra*, Daddona killed a man on June 6, 1942, and was sentenced to five years imprisonment on September 23, 1942. He was paroled in 1945 and received an executive pardon on May 5, 1947. On July 18, 1947, he filed a naturalization petition and in 1948 the Court ruled that under the decisions of the United States Court of Appeals, good moral character during the prescribed period is the only test of fitness prescribed by the statute. In fact, in the *Daddona* case the Court ruled good behavior of the petitioner and gave him credit for the time he spent in incarceration.

Also see Petition of Zele, 127 F. 2d, 578, 580—id. 140 F. 2d, 773, 776.

*Repouille v. United States*, 2 Cir. 1947, 165 F. 2d, 152, a manslaughter case, is typical, wherein either a conviction or an admission by the petitioner himself established the commission of a crime involving moral turpitude within the five year period, but the courts did not deny naturalization out of hand on that ground.

Petitions of *Rudder, etc.*, 159 F. 2d, 695, states that morality is not to be measured by conventional formality,

nor are the mores of a community static. In one of the petitions one Jannibelli, whose wife refused to give him a divorce, maintained an adulterous relationship with an unmarried woman for eight or nine years and the Court held "We do not believe that the present sentiment of the community views as morally reprehensible such faithful and long continued relationships under circumstances here disclosed." The petition was granted with the observation that there is an increasingly liberal trend in naturalization cases.

In *United States* v. *Cunha*, 209 F. 2d, 326, it was held that an alleged conviction during the statutory period, of attempted larceny of an automobile, which in Massachusetts constituted a felony involving moral turpitude, did not conclusively establish "bad moral character" within the Nationality Act of 1940.

In the *Petition of Zele, supra*, it was held that the burden of proof to show good moral character rests upon the petitioner, but that good behavior during the five year period (i.e. preceding the date of the petition) is the only test of moral fitness provided in the Statute; that under the law the burden is on the petitioner to establish good moral character only during the five year period and no earlier;

See:

*Petition of Zele*, 127 F. 2d, 578, 2 Cir.;
*United States* v. *Clifford*, 2 Cir., 89 F. 2d, 184;
*United States* v. *Rubia*, 5 Cir., 110 F. 2d, 92;
*In Re Addecoa, D. C. Idaho*, 22 F. Supp., 659, 661.

And it has consistently been construed liberally so as to sanction forgiveness after the expiration of five years from the date of a disbarring misdeed;

*In re Trum*, D. C. W. D., Mo., 199 F. 361;

*In re Centi,* D. C. W. D., Tenn., 217 F. 833;
*In re Giuliano,* D. C. S. D., N. Y., 156 F. 420;
*In re Nagy,* D. C. S. D., Tex., 3 F. 2d 77;
*In re Schlau,* 2 Cir. 136 F. 2d, 480.

The cases are replete in the contention that good moral character for a prescribed statutory period of a petition for naturalization is a question of fact. Although wide discretion is lodged in hearing petitions, discretion cannot be exercised arbitrarily or in manner which adds to requirements of law, which must be construed liberally in favor of the petitioner. (Naturalization Act, June 29, 1906, Section 4, Sub-division 4, see *Tutun* v. *United States, supra.*).

It can be observed that there are a great number of cases where the court has construed the Act most liberally in favor of the petitioner even where there has been a commission of a crime within the statutory period of five years immediately preceding the filing of a petition. In the present application we have a petitioner against whom there is absolutely no evidence involving bad moral character for a period of over twelve years.

In the instant case the Court is now charged with the duty of determining whether the petitioner has borne the burden of proof in establishing "good moral character." The Court has before it the following facts: The petition of a resident alien to citizenship who, immediately preceding the date of his application, has resided continuously within the United States five years at least, and within the State or Territory where such Court is at the time held several sessions a year at least, and that during that time the petitioner, under oath has sworn that he has behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same. In addition

PAGE BLEED THRU

to the oath of the applicant there is the testimony of at least two reputable witnesses, citizens of the United States who have, under oath, testified as to the facts of residence, good moral character and attachment to the principles of the Constitution, as required.

Before determining whether the petitioner has borne the burden of proof by conforming to the statutory requirements the Court turns its attention to the narrow issue upon which the government rests its entire case, i.e., points (i) and (j) in the Findings of Fact. This involves the contention that the petitioner derives from $7,200.00 to $9,600.00 per year income from a partnership interest he has in a plastic concern, rentals from properties he owns, and interest on government bonds, and yet has been declaring $25,000 and more yearly for income tax purposes. The petitioner has claimed, under oath, that the difference between his listed income and income tax declaration has been made from wagering on horses at the various race tracks. The Federal Examiner contends that this is incredible and not worthy of belief, and that this Court should assume that the difference in the two sums is secured illegally. It is not within the province of this Court to speculate or guess on an essential fact nor is the court so skilled as to determine the expertness of the petitioner in being able to accrue such winnings and profits by legal betting at legally established race tracks, two of which are in operation in the immediate vicinity wherein the petitioner resides.

Again the Court observes that the petitioner has been under minute inspection for a great number of years and not a shred of evidence is produced to support the government's conclusions of deliberate fabrication. This challenge, therefore, cannot be resolved in the government's favor. Although the record is not as full as it should be as to the petitioner's actual conduct during the crucial five

year period, it seems clear, except or the challenge here made, his conduct is appropriate to justify naturalization.

Oftimes a man, who has or is imbued with, the highest of "good moral" principles, has fallen or slipped from his lofty perch, and conversely it may be said that many men with records of ill repute have striven, under adverse conditions, to redeem themselves by conforming, conscientiously, to the well accepted and known rules of society. In either case it is well accepted that all pertinent government agencies have, as one of their primary functions, the obligation to assist in the rehabilitation of man.

In the subject petition we have a petitioner who has met all the statutory requirements as aid down by the Nationality Act of 1940, regarding the statutory period of "five years immediately preceding the filing of his petition". During the statutory period he, apparently, has conducted himself as a law abiding person. He has engaged in legitimate enterprise and there is no evidence before the Court to show any activity that would deny "good moral character" for the prescribed period. His witnesses have sworn, under oath, that he is a reputable man, loyal and attached to the principles of the Constitution of the United States.

The Court must assume that the petitioner is sincere in his sworn statements and finds it its duty to aid him in his apparent rehabilitation. A contrary view at this time could result in great injury to the petitioner's morale if his "good moral character" was acquired by conscientious application.

In *Tutun* v. *United States*, 270 U. S. 568, 578 (1926), Justice Brandeis said:

> "The opportunity to become a citizen of the United States is said to be merely a privilege and not a right. It is true that the Constitution does not confer upon

aliens the right to naturalization. But it authorizes Congress to establish a uniform rule therefor . . . The opportunity having been conferred by the Naturalization Act, there is a statutory right in the alien to submit his petition and evidence to a court, to have that tribunal pass upon them, and, if the requisite facts are established to receive the certificate . . . In passing upon the application the court exercises judicial judgment. It does not confer or withhold a favor".

Congress having laid down the rules governing the admission of aliens to citizenship it is not within the power of the Court in the exercise of arbitrary discretion, to add to them. For the purposes of this petition therefore the Court is bound by Section 307 (a) of the Nationality Act of 1940 and in pursuance of the intent of that particular Act the Court finds that the petitioner has met all the necessary requirements of this Act and therefore admits the petitioner to citizenship.

SUPREME COURT OF NEW JERSEY

No. A-58 Sept. T. 1955

(Filed January 3, 1956)

In the Matter of the Petition of MARCO REGINELLI, No. 2186-P-9291 for Naturalization (MARCO REGINELLI, Petitioner-Respondent; UNITED STATES OF AMERICA, Appellant).

Argued; ——— decided.

On appeal from the Atlantic County Court.

Mr. Carl Kisselman argued the cause for respondent. Mr. John B. Brumbelow, of the Pennsylvania Bar, and Mr. Jack Wasserman, of the District of Columbia Bar, on the brief.

Mr. Raymond Del Tufo, Jr., United States Attorney, argued the cause for appellant. Mr. Charles H. Nugent and Mr. Herman Scott, Assistant United States Attorneys, on the brief.

The opinion of the court was delivered by

WACHENFELD, J.

The United States of America appeals from a judgment entered in the Atlantic County Court rejecting the adverse recommendations of the naturalization examiner and granting the respondent's petition for citizenship. Deeming it a cause of public concern, we granted certification prior to argument in the Appellate Division.

Power to determine applications of aliens to become United States citizens is conferred upon the County and Superior Courts by N.J.S. 2A:53-1, and it is not disputed that a judgment granting a naturalization petition is final and therefore appealable. *Tutun* v. *U. S.*, 270 U.S. 568, 70 L. ed. 738 (1925).

The issue presented is governed by the Immigration and Naturalization Act of 1940. The pertinent section of this act, 54 Stat. 1142, Sec. 307(a), 8 U.S.C. 707(a), repealed, 66 Stat. 280, provides in substance that no petitioner shall be granted naturalization unless he shows that for a period of five years prior to the date of filing his petition he ". . . has been and still is a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States."

The inquiry here is whether the respondent, within this statutory definition, establish good moral character.

Prior to filing the present petition in September 1952, the respondent, Reginelli, had filed three previous petitions for naturalization, with the following results:

(1) Petition filed June 2, 1937, in the Court of Common

Pleas, Northumberland County, Sunbury, Pennsylvania—denied October 5, 1939 for lack of prosecution;

(2) Petition filed October 10, 1944 in the United States District Court of Camden, New Jersey—denied October 17, 1949 by then Chief Judge Fake, who found Reginelli was not of good moral character because of a Mann Act conviction which occurred in 1942, within five years of the date of filing of the petition. See *Petition of Reginelli*, 86 F. Supp. 599 (D.N.J. 1949);

(3) Petition filed March 23, 1950 in the United States District Court of Camden, New Jersey—denied August 4, 1950 on Reginelli's own motion.

The instant effort is the respondent's fourth attempt at naturalization. His petition, after being denied by the naturalization examiner, was granted on September 23, 1952 in the Atlantic County Court, the petitioner claiming his residence was then in Margate City, located in that county.

The respondent, Reginelli, is a native of Italy and unmarried. He arrived in the United States on June 4, 1914 and has not left the country since.

At the hearing before the naturalization examiner, he admitted sixteen arrests during the period 1917 to 1942. He was convicted of crime on six of these occasions, three times receiving the imposition of fines and three times receiving prison sentences. The offenses in this classification included liquor violations, cheating at cards, lottery, fraudulent conversion, disorderly conduct and violation of the Mann Act.

The last arrest or conviction was in 1942 on the Mann Act charge, respondent having been convicted of transporting a woman from New Jersey to Florida for immoral purposes.

Reginelli produced two character witnesses who testified before the examiner as to his good moral character

during the five years preceding the filing of his petition.

At the hearing and here the issues resolved themselves into Reginelli's continued illicit relations with the woman in question, Louise Abate, and the sources of his present income. When asked by the examiner whether during the five years preceding the filing of his petition he continued to have improper relations with the Abate woman, he refused to answer the question and his counsel pleaded the Fifth Amendment on his behalf.

The Government insists this incident be taken into consideration as the respondent, in making application for naturalization, was under obligation to make a full, frank disclosure of all facts bearing upon his right to citizenship and in effect waived any right to rely upon the provisions of the Fifth Amendment. See *U.S.* v *Accardo,* 113 F. Supp. 783, 787 (D.N.J. 1953), Aff'd per curiam 208 F. 2d 632 (3d Cir. 1953), cert. denied 347 U.S. 952 (1954).

Some doubt is cast upon the rule so enunciated by *Schmidt* v. *U.S.,* 177 F. 2d 450 (2d Cir. 1949). We do not find it necessary to decide this conflict as our conclusion is based upon other grounds, as will be seen hereafter.

Other conduct is called to our attention by the Government's brief, relating to an alleged arrest of the respondent in a hit-and-run accident in 1948, but we give it no concern as we deem the Government failed in its proof in this respect.

As to the stautory prerequisites of good moral character for five years prescribed in the Act, some federal courts have determined that conduct outside the statutory period is immaterial in determining the applicant's qualifications for naturalization. *U.S.* v. *Clifford,* 89 F. 2d 184 (2d Cir., 1937); *U.S.* v. *Rubia,* 110 F. 2d 92 (5th Cir. 1940); *Petition of Zele,* 127 F. 2d 578 (2d Cir. 1942); *Application of Murra,* 178 F. 2d 670 (7th Cir. 1949).

Much judicial support, however, is given the view that the court is not so restricted or limited and may consider a petitioner's conduct outside the statutory period in concluding whether or not good moral character was established by the record. *Ralich* v. *U.S.*, 185 F. 2d 784, 788 (8th Cir. 1950); *Marcantonio* v. *U.S.*, 125 F. 2d 934 (4th Cir. 1950); *In re Lipsitz*, 79 F. Supp. 954, 956 (D. Md. 1948); *In re Markiewicz*, 90 F. Supp. 191, 194 (W.D. Pa. 1950); *In re Bespatow*, 100 F. Supp. 44, 45 (W.D. Pa. 1951).

These authorities rejecting the limited view hold that citizenship, being a high privilege, is not to be measured by an artificial or inflexible rule and a petitioner's past completely cut off without the right to consider it no matter what the circumstances may be. In substance, they conclude the five-year period of the statute is merely the minimum requirement for naturalization, nevertheless permitting, if the circumstances warrant it, a denial for something which occurred prior thereto.

We prefer to embrace these latter adjudications as establishing a rule more workable and practical, conducive of sounder and more realistic justice, particularly where, as here, the past may by logical inference illuminate some presently occurring development.

As to the respondent's source of income, he acknowledged that during the five-year period preceding the hearing he had reported income for federal income tax purposes of from $25,000 to $50,000 per year. His only known source of income was from a plastics manufacturing company, some real estate and Government bonds which netted him a total of between $7,000 and $8,000 a year.

When asked to explain his other income, he testified the additional income which he reported was made by wagering at race tracks, including Atlantic City, Garden State, Pimlico, Bowie and the Florida tracks. When asked by the examiner to name any horse upon which he had won

any considerable sum of money, he was unable to do so. He could not even remember whether he had been at the Garden State track within the past year, nor could he remember whether he had been or when he had last been at that track. He could not recall how much he had won on any single day.

In a vain effort to bolster his testimony, he offered to produce race track programs showing the horses he had bet on and his winnings. There was an agreement upon the record that he would submit this information to the examiner through his attorney. He never did so, however, and when reminded of it at the hearing before the County Court, he still failed to produce them and made no offer to do so.

The hearing examiner made findings of fact rejecting Reginelli's story as to his main source of income as incredible and found specifically that the applicant had not sustained his burden of showing that he was of good moral character, and therefore recommended that his citizenship petition be denied.

These recommendations, as noted above, were rejected by the County Court, which was of the opinion that the Government's charges against Reginelli rested upon hearsay, rumor and inferences derived from his past bad record.

On a petition for naturalization, the burden of proving good moral character and the applicant's eligibility for citizenship rests upon him, and any doubt concerning the qualifications must be resolved against the applicant and in favor of the United States. *U.S.* v. *MacIntosh*, 283 U.S. 605, 75 L. ed. 1302 (1931); *U.S.* v. *Schwimmer*, 279 U.S. 644, 73 L. ed. 889 (1929); *U.S.* v. *Manzi*, 276 U.S. 463, 72 L. ed. 654 (1928); *Tutun* v. *U.S.*, supra; *Brukiewicz* v. *Savoretti*, 211 F. 2d 541 (5th Cir. 1954).

The County Court did not hear any of the testimony and came to its conclusion on the same record before

the examiner which is the present record before us. It is significant that the Court, in discussing the issues before rendering its decision, noted; "Although the record is not as full as it should be as to the petitioner's actual conduct during the crucial five-year period . . . ," and despite the examiner's suggestion to the Court "to question the petitioner more closely about this in the course of this hearing," no further testimony was adduced either by direction of the Court or by the applicant's counsel.

We have read and carefully analyzed Reginelli's testimony in its entirety, and we must conclude that by and large his evidence is unworthy of belief. Throughout he was evasive and at times to a point of outright untruthfulness. It was manifest he had no desire or intention to make a complete disclosure to the examiner of his past record and his present activities but sought to withhold as much information as he could wherever it was possible.

It was established in a prior application and so found by the federal District Court in 1949 that Reginelli's only source of income, under these circumstances, compel the conclusion that his large, otherwise unexplained income during the period into which we are inquiring was still derived from the same illegal gambling activities.

His attempted explanation of the sources of his income, i.e., that he earned it from wagering on race horses, was incredible, especially in view of his inability to recall the name of a single horse on which he had won a large sum of money during the preceding five years, although he at times bet thousands of dollars. Additionally, credulity would be imposed upon to a marked degree were we to believe that the respondent could be so uniformly and consistently successful in so uncertain and precarious a venture as his track endeavors.

The record shows that his answers were conflicting, vague and unresponsive. His attitude and general demeanor were wholly unconvincing to portray a reformation from an admittedly badly spotted past to a forthright, reasonably clean status entitling him to the cherished advantages of the citizenship he sought.

The burden of proof in this regard was upon him, and his failure in his obligation to sustain it is evident throughout the record before us. Under our present Judicial Articles we have the right to review matters of fact as well as law. *Colacurcio Contracting Co.* v. *Weiss*, — N.J. — (1955).

Our conclusions are in accord with those reached by the examiner, and we find that the respondent has failed to prove good moral character as required.

The judgment below granting citizenship is reversed and the petition is denied.

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# In the Supreme Court of the United States

OCTOBER TERM 1955

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No. 764

MARCO REGINELLI, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINIONS BELOW

The opinion of the Supreme Court of New Jersey (Pet. App. 24–31) is reported at 20 N. J. 266, 119 A. 2d 454. The opinion of the County Court (R. 96–107) is reported at 36 N. J. Super. 455, 116 A. 2d 214. The recommendation, findings of fact, and conclusions of law of the Naturalization Examiner appear at R. 51–72.

### JURISDICTION

The judgment of the Supreme Court of New Jersey was entered on January 3, 1956. The petition for a writ of certiorari was filed on

March 14, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1257 (3).

## QUESTIONS PRESENTED

The Supreme Court of New Jersey, upon appeal, reversed a County Court judgment granting naturalization, because of the failure of the petitioner to sustain the burden of showing good character. The County Court had not taken testimony but had acted upon the same written transcript of testimony before the Naturalization Examiner that was later acted upon by the Supreme Court. The questions presented are:

1. Whether, upon the particular facts, the state Supreme Court's review upon appeal involved an exercise of powers different from those under federal appellate procedure, or, if different, whether the scope of review in this case was invalid as a violation of the constitutional requirement of uniformity for naturalization.

2. Whether the government, in a direct appeal based on the applicant's failure of proof within the naturalization proceeding itself, is subject to the requirement imposed where the government institutes a collateral attack on a completed citizenship proceeding, *i. e.*, that citizenship cannot be taken away except upon clear and convincing evidence.

3. Whether the state Supreme Court, in evaluating petitioner's current moral character, placed

any improper reliance on petitioner's earlier conduct and criminal record.

### STATUTE INVOLVED

Section 307 of the Nationality Act of 1940, 54 Stat. 1142, 8 U. S. C. (1946 ed.) 707, provides in part:

> (a) No person, * * * shall be naturalized unless such petitioner, * * * during [the period from five years preceding the date of filing the petition to the time of admission to citizenship] has been and still is a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States.

### STATEMENT

Petitioner seeks review of the judgment in which the Supreme Court of New Jersey (Pet. App. 31) reversed the judgment of the County Court (R. 110–111) and denied petitioner's application for naturalization (R. 3–4).

The instant petition for naturalization is the fourth filed by petitioner, the others having been filed in 1937, in the Court of Common Pleas, Sunbury, Pennsylvania, and in 1944 and 1950 in the United States District Court at Camden, New Jersey. The first petition was denied for lack of prosecution, the second upon the District Court's finding that petitioner was not of good

moral character, and the third upon petitioner's own motion (R. 3, 61).

The record in the present proceeding may be summarized in chronological order as follows:

Petitioner entered the United States for permanent residence in 1914 (R. 2). According to the list of arrests submitted by him, his first arrest was three years later in 1917, as a suspicious character in Philadelphia. He was discharged by the magistrate (R. 10–1, 62). In 1920, he was fined $300 at Trenton, New Jersey, upon a liquor offense (R. 11, 62). In 1923, he was arrested in Philadelphia as a suspicious character and discharged (R. 11–12, 2). In 1924, he was fined $100 at Pittsburgh, Pennsylvania, on a gambling charge (R. 12–16, 6). In 1924, he was arrested as a suspicious character in Philadelphia and discharged (R. 16, 6). In 1926, he was convicted of an $1,800 fraud in gambling in Philadelphia; he made restitution and was sentenced to a year's imprisonment (R. 16–17, 62).

In 1930, petitioner was arrested in Camden, and charged with illegal possession of firearms, including a pistol and shotgun (R. 17–18, 62); in 1930, he was arrested in Philadelphia for frequenting a gambling house (R. 18, 62); in 1931, he was arrested in Philadelphia as a suspicious character and investigated for murder (R. 18–19, 62); in 1931, he was arrested in Camden as a material witness (R. 18–19, 2). In these instances he was discharged. In 1933, he was fined $100 at

Camden upon a charge of aiding a lottery (R. 19–20, 62). In 1934, he was arrested on suspicion of running a lottery (R. 20, 62) and in 1936 he was arrested as a suspicious character in Philadelphia (R. 20, 62). In these instances he was again discharged. On January 5, 1937, he was arrested at Camden under a law against congregating with persons with criminal records, sentenced to six months' imprisonment and fined $100, which was reversed on appeal (R. 20–21, 63).

On June 2, 1937, petitioner filed a petition for naturalization in the Court of Common Pleas at Sunbury, Pennsylvania. The petition was denied on September 5, 1939, for want of prosecution (R. 61). In 1942, petitioner was arrested as a material witness in Camden, in an investigation of the murder of one Lessey, who was associating with Louise Abate (R. 21–22, 63). He was discharged but in the same year was convicted of a Mann Act violation involving the transportation of Louise Abate, sentenced to six months' imprisonment and fined $1,500 (R. 22–23, 63). In the same year, he was arrested as an enemy alien and released on parole (R. 23).

On October 10, 1944, petitioner filed a petition for naturalization in the United States District Court at Camden. The petition was denied for failure to prove moral character, the District Judge relying specifically upon the above Mann Act conviction during the statutory period, and stating, in a written opinion filed on October 17,

1949, "it further appears that this petitioner has had many close escapes from the clutches of the law, and that his only means of support is that of a gambler" (R. 61, 64; *Petition of Reginelli*, 86 F. Supp. 599, 600). On March 23, 1950, petitioner filed another petition for naturalization in the same court, which was denied on his own motion in August of the same year (R. 61).

On May 28, 1948, in Camden, petitioner was involved in a hit-and-run automobile accident at 2:55 a. m. in which he hit another car, injuring two persons. He was chased by a police car and arrested one mile from the scene. He was reported as causing trouble to the arresting officers and was taken to headquarters in a police van. He made settlement with the injured persons and was not booked (R. 25–26).

Petitioner admitted income for the years 1947 through 1951 of $40,000 to $50,000 per year and $25,000 for 1952 (R. 30, 32). He explained $2,400 per year as income from a property, $5,200 as salary from a plastics manufacturing company in which he became a partner in 1948 and in which he claimed a 27 percent interest, and $50 interest on government bonds (R. 31–32, 64–65). He also claimed a distribution of profit from the plastics firm in 1950 or 1951 in the amount of $17,000 (R. 31–32). As to the remaining, major portions of the income, petitioner asserted that wagers on horse races were the source (appar-

ently the sums above $2,450 in 1947, above $24,650 in 1950 or 1951 and above $7,650 in the remaining four years).

On July 19, 1950, petitioner executed a declaration of intention, in which he listed the additional names, "Marco Reginello, Mark Di Nardo, Mark Di Luis." He stated his residence as Camden, New Jersey, and his occupation as "Partner—Plastic Products", and stated that he had a daughter, born 1923 (R. 1).

On August 15, 1952, petitioner's car was involved in an accident. The Naturalization Examiner's information was to the effect that petitioner left his car and fled in another car in which he was caught by the police, in company with one William Weisberg, a notorious gambler and numbers man (R. 27, 29). Petitioner stated that he had loaned his car to a friend, that Weisberg came to petitioner's house to tell him of the accident, and that he had voluntarily driven to the scene with Weisberg (R. 27–30).

On September 23, 1952, petitioner executed the instant application for naturalization. He did not state his former aliases, and now stated his residence to be Margate City, New Jersey, and that he had "no" children (R. 3). The appended affidavit of witnesses Siniscalco, physician, and Di Luigi, bottler, residing in Camden and Atlantic City, respectively, stated personal knowledge, *inter alia,* that petitioner had been a person

of good moral character and had resided at Margate City "continuously since January 1, 1940" (R. 4). Cf. petitioner's statement of residence in Camden in 1950 (*supra*, p. 7).[1]

At the hearing before the Naturalization Examiner on April 10, 1953, at which petitioner was accompanied by counsel, petitioner testified, upon interrogation by the Examiner, that he had a home at Camden where he stayed "occasionally," that his business was only about six or eight miles from Camden, and that he stayed at Margate weekends "[m]ostly, if I am around" (R. 8–9). He also testified that he had lived in Margate City "since about March, 1951" (R. 49).

Petitioner explained that he had used the various aliases for his "people's sake * * * not to let them know that I was pinched." He stated inability to remember whether he used additional names, or, specifically, the name Canterano (R. 9–10).

As to most of the arrests, he recalled details of the places and various incidents of arrests (R. 11–12, 14, 16–21), and admitted operating a lottery "off and on" in 1933 or 1934 (R. 20), but could not remember whether he was engaged in bootlegging at the time of one arrest (R. 11),

[1] On June 21, 1955, petitioner moved to amend his petition to correct two typographical errors, but no amendment was offered as to the witnesses' or petitioner's statements concerning petitioner's residence (R. 5).

what the police officers charged in another instance (R. 14), what his occupation was at the time (R. 14), or what additional charges were involved in the fraud and restitution case (R. 17). He could not remember the names of the murdered men concerning whom he was investigated on two occasions, although in one case the victim was associating with petitioner's girl friend (R. 18, 22). He did not know whether he was aiding the running of a lottery, or was a member of the lottery club, or taking numbers or banking (R. 19–20). He could not remember whether he was taken to police headquarters in a police van after the hit-and-run accident of 1948 (R. 23–26), whether he had been to the Garden State Track in the past year (R. 33), whether he had been to the Atlantic City race track (R. 33), whether he had seen Louise Abate within the past year (R. 49), how long he had lived with the mother of his child prior to the birth (R. 53), and whether he had had sexual relations with any other women (R. 59). Petitioner totally refused to answer whether he had had sexual relations with Louise Abate since the Mann Act conviction, asserting his constitutional privilege (R. 51–52, 60).

At the hearing, petitioner was also questioned by the Examiner on his claim that he had won large sums by betting on horse races (*supra,* pp. 6–7). He was unable to name any horse upon

which he had wagered, although asserting that he had sometimes won as much as $4,000 on a single horse (R. 30, 32–35, 86–87). He said that he had racing programs at his home, showing bets, and agreed to furnish them to the Examiner, but this was never done. At the later appearance before the County Court Judge, petitioner's attorney stated "the reason it wasn't followed up is that they started deportation proceedings which took a great deal of time and required an intervening time between that and this." The claimed programs were not presented in court (R. 35, 60, 89).[2]

The Examiner reported, as of March 9, 1955, that investigation conducted by the Immigration and Naturalization Service revealed that:

> [T]he principal associates of the petitioner are notorious underworld characters. He admits knowing some of these people but says his acquaintanceship is merely casual * * * [R. 66; and see petitioner's own admissions, R. 29, 36–37, 42, 46–47].

The report also stated that (R. 63):

> [Petitioner] is well known to all the law enforcement officials in southern New Jersey and southeastern Pennsylvania and is reputed by them to be an underworld figure of stature and one of the leaders of the numbers and gambling business as well

[2] The deportation proceedings failed because the Mann Act conviction was held not to involve moral turpitude (R. 88).

as having connections with other forms of vice.

The Examiner concluded and reported that petitioner had not sustained the burden of proof that he had been a person of good moral character for the statutory five-year period (R. 72).

The judge of the County Court relied entirely upon the transcript of testimony before the Examiner, and took no testimony in person, despite the Examiner's suggestion that the judge question petitioner more closely (R. 78, 91). Petitioner, when invited to do so, presented no testimony (R. 91, 93). The judge granted naturalization, relying upon the character witnesses and upon the assumption that government facilities would "certainly" have been able to afford affirmative proof of illegal conduct or income received by petitioner (R. 100, 105). The judge admitted that "the record is not as full as it should be as to the petitioner's actual conduct during the crucial five year period" (R. 105) and that petitioner, in the grant of naturalization, had "been given the benefit of the doubt" (R. 95). The judge further stated that he would not determine the truth of petitioner's explanation of his large income (R. 105), and concluded that he "must assume" that the petitioner was "sincere" in his sworn statements (R. 106).

The Supreme Court of New Jersey, "[d]eeming it a cause of public concern" (Pet. App. 25), granted certification of the government's appeal

prior to argument in the Appellate Division (Pet. App. 25). The court, without relying upon petitioner's refusal to answer as to recent relationships with the woman who had been involved in the Mann Act conviction (Pet. App. 27), and without relying upon the 1948 hit-and-run conduct (Pet. App. 27), held that, upon examination of the same record which had been the County Court judge's sole basis of judgment, petitioner's testimony was "unworthy of belief" and that his "attempted explanation" of his huge income as derived from betting on horses, without being able to name a single horse, was not to be believed (Pet. App. 30). The court stated (Pet. App. 30–31):

> * * * Throughout he was evasive and at times to a point of outright untruthfulness. It was manifest he had no desire or intention to make a complete disclosure to the examiner of his past record and his present activities but sought to withhold as much information as he could wherever it was possible.
>
> * * * * *
>
> * * * His attitude and general demeanor were wholly unconvincing to portray a reformation from an admittedly badly spotted past to a forthright, reasonably clean status * * *
>
> [H]is failure in his obligation to sustain [the burden of proof] is evident throughout the record before us. * * *

## ARGUMENT

1. A basic misconception permeates petitioner's effort to have this Court review an essentially factual matter. The petition assumes that the Supreme Court of New Jersey simply reversed after a *de novo* consideration of oral testimony heard by the trial court, and that no question of law was involved. But what is actually involved is the failure of the County Court to recognize that the burden of proof was petitioner's to show himself qualified for citizenship—a failure which amounted to a mistake of law—and then a reappraisal by the appellate court, under the proper standard, of the same written record that was before the lower court. There is nothing novel about such appellate power.

(a). Petitioner had the responsibility of showing that his admitted criminality of the past had been supplanted by good moral character. As pointed out in the opinion of the Supreme Court of New Jersey (Pet. App. 29):

> On a petition for naturalization, the burden of proving good moral character and the applicant's eligibility for citizenship rests upon him, and any doubt concerning the qualifications must be resolved against the applicant and in favor of the United States. *U. S.* v. *MacIntosh,* 283 U. S. 605 [626], 75 L. ed. 1302 (1931); *U. S.* v. *Schwimmer,* 279 U. S. 644 [649–650], 73 L. ed. 889 (1929); *U. S.* v. *Manzi,* 276 U. S. 463 [467], 72 L. ed. 654 (1928);

*Tutun* v. *U. S.*, supra [270 U. S. 568, 578]; *Brukiewicz* v. *Savoretti*, 211 F. 2d 541 [543] (5th Cir. 1954).

In petitioner's case this burden had to take into account the history of his prior efforts to attain citizenship. He had attempted to obtain naturalization before three judges in Pennsylvania and Camden, New Jersey, during the years before he claimed residence in Margate City within the jurisdiction of the instant County Court. He had himself abandoned his 1937 and 1950 petitions, and his remaining petition had been rejected by a United States District Court in October 1949 in an opinion referring, not only to petitioner's Mann Act conviction, but to the further fact that petitioner's only means of support was that of a gambler (86 F. Supp. 599, 600).

On the instant application, less than three years later, the County Court judge misconceived petitioner's burden to show good moral character in a clear and forthright exposition of all the facts, including source of income, and instead, in a clear error of law, the court gave petitioner "the benefit of the doubt" on the theory that the court "must assume" that the petitioner was "sincere in his sworn statements." The judge relied upon affidavits of the two character witnesses—witnesses who swore to petitioner's residence within the jurisdiction of the County Court since 1940, when petitioner himself set the time ten years

later, in 1950. And the judge further erroneously assumed that the government was charged with bringing in witnesses to negative an exposition by petitioner that was properly characterized by the Supreme Court of New Jersey as "evasive and at times to a point of outright untruthfulness," and "unworthy of belief."

(b). Moreover, even if the action of the New Jersey Supreme Court be regarded solely as a review of the facts, the right of an appellate court to take cognizance of a too-flagrant deficiency in evidence is not novel and does not show lack of uniformity between state and federal practice. The basic federal rule has been stated in *United States* v. *Gypsum Co.*, 333 U. S. 364, 394–395:

> [Rule 52 (a) of the Rules of Civil Procedure] prescribes that findings of fact in actions tried without a jury "shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." It was intended, in all actions tried upon the facts without a jury, to make applicable the then prevailing equity practice. * * * The practice in equity prior to the present Rules of Civil Procedure was that the findings of the trial court, when dependent upon oral testimony where the candor and credibility of the witnesses would best be judged, had great weight with the appellate court.

> The findings were never conclusive, however. A finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.

And see, *e. g.*, the recent extensive reappraisal of evidence by this Court in *Remmer* v. *United States,* this Term, No. 156, slip opinion, pp. 3–5. It has also been held by several Courts of Appeals that the scope of appellate review is greater where the testimony before the trial court was by deposition, as here, or the evidence was documentary. E. g., *Orvis* v. *Higgins*, 180 F. 2d 537 (C. A. 2), certiorari denied, 340 U. S. 810; *Dollar* v. *Land,* 184 F. 2d 245 (C. A. D. C.), certiorari denied, 340 U. S. 884; and cases cited by the Advisory Committee's Report of Proposed Amendments to the Rules of Civil Procedure for the United States District Courts, October 1955, at pp. 52–53.

Applying the federal standard, the New Jersey Supreme Court was clearly justified in overturning the County Court's ultimate finding of good moral character. Mere passage of time since the last conviction, petitioner's own unsupported assertions, and the conclusions of the two character witnesses could not constitute affirmative proof of petitioner's current good moral character, in the face of a continuing, conceded huge income of

which the greater part is unaccounted for except by an "explanation" that the tens of thousands of dollars were the product of wagers on horses—without ability to recall the name of a single horse upon which a wager was placed—and in the face of the inconsistencies and gaps in petitioner's other "explanations."[3]

2. More fundamentally, petitioner's whole concept of what is required under the uniformity provision[4] is in error. The Constitution does not wipe out all differences in court procedure. *Bindczyck* v. *Finucane*, 342 U. S. 76, on which petitioner relies (Pet. 8) for the contrary view, is inapposite. That case did not deal with a direct appeal, as here, where the challenge is directly to the judgment and record, for a failure of sufficient evidence. *Bindczyck* dealt with an effort collaterally to set aside a judgment of naturalization upon matters outside the record, in which case the exclusive denaturalization proce-

[3] This Court has stated the always-present reservation that there is no requirement "that uncontradicted evidence of a witness must be accepted as true on the hearing." *Hawk* v. *Olson*, 326 U. S. 271, 279. And see *Harpin* v. *Johnston*, 109 F. 2d 434, 435 (C. A. 9), certiorari denied, 310 U. S. 624; *Albert ex rel. Buice* v. *Patterson*, 155 F. 2d 429, 432 (C. A. 1), certiorari denied, 329 U. S. 739; *Farrell* v. *Lanagan*, 166 F. 2d 845, 847–848 (C. A. 1), certiorari denied, 319 U. S. 776; *Ex parte Farrell*, 189 F. 2d 540, 545 (C. A. 1), certiorari denied, 342 U. S. 839.

[4] Const., Art. I, Section 8, Clause 4: "The Congress shall have power * * * To establish an uniform Rule of Naturalization * * *."

dures of Section 338 of the Nationality Act of 1940 were held to be applicable because of the purpose, implicit in that section and in its history, to establish a uniform procedure in all essentially collateral challenges of naturalization.

With respect to direct appeal upon the record itself and to comparable matters of procedure, the situation remains different. Naturalization proceedings have long been held in state courts, and the right to appeal was established by this Court in 1926 (*Tutun* v. *United States*, 270 U. S. 568). Successive enactments of naturalization legislation thereafter, which provided no exclusive appeal procedure or appeal criteria, must be deemed to have left appeal to the known variants of the state and federal courts, in recognition that those variants created no substantial or basic non-uniformity within the essence of the uniformity requirement. This was clearly stated in the *Bindczyck* decision (342 U. S. 76, 87):

> * * * Of course there are differences among State judiciaries as to the time within which an appeal can be taken. But the differences are within a narrow and unimportant range compared with the enormous and quixotic differences relating to a court's control over its judgments on the score of fraud or illegality. It is one thing to allow some play for the joints in a statutory scheme like the Nationality Act, enforceable by both State and federal courts. It is quite another to inject a wholly dis-

> locating factor by incorporating the diverse State rules for vacating judgments into the revocation process, which Congress specifically and comprehensively dealt with in § 338.
>
> * * * The bill before Congress in 1906 provided for a uniform mode of appeal to the United States Circuit Courts of Appeals from naturalization judgments rendered by State, as well as federal, courts. H. R. 15442, 59th Cong., 1st Sess., § 13. Constitutional doubts and the practical problems which such an anomalous procedure would raise led to the omission of this section, leaving appeal procedure to the States. 40 Cong. Rec. 7784–7787. * * *

3. There is likewise no merit in petitioner's effort to analogize the instant direct appeal on the naturalization record to attempts to denaturalize or expatriate, once citizenship has been granted in a completed naturalization proceeding, for matters outside the record. The petition contends (Pet. 9) that the Supreme Court of New Jersey should have required "clear, convincing and unequivocal evidence" to "deprive of citizenship," invoking *Schneiderman* v. *United States*, 320 U. S. 118; *Baumgartner* v. *United States*, 322 U. S. 665, and *Gonzales* v. *Landon*, 350 U. S. 920. But none of these cases involved appeals of the original acquisition of citizenship; they were collateral challenges to citizenship long after the citizenship had been established by com-

pleted proceedings, or (as in *Gonzales*) established by the incontestable factor of birth in the United States. Petitioner's contention is, in reality, an attempt to overturn, so far as the government is concerned, the right of direct appeal settled by the *Tutun* case and to give a special, unwarranted status to the initial awarding of naturalization by the *nisi prius* court.

4. Petitioner also seeks to inject a semblance of conflict as to the effect of events occurring prior to the statutory period during which an applicant for citizenship must prove good moral character. The asserted conflict as to the 1940 Act is a matter of language and not of reality, and it is in no sense posed in the instant case.[5] While the Supreme Court of New Jersey expressed approval of rulings permitting reliance upon earlier events, the decision clearly and squarely rests upon petitioner's failure to account for his current income and his evasive and less-then-candid conduct at the Examiner's hearing—in short, upon his failure to sustain the burden of proving his good moral character (Pet. App. 28–31). Petitioner's earlier history merely emphasized the weight of his burden of proof, as well as the character of his current conduct.

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[5] Section 316 (e) of the Immigration and Nationality Act of 1952, 66 Stat. 242, 243, 8 U. S. C. (1952 ed.) 1427, provides that the naturalization "court shall not be limited to the petitioner's conduct during the five years preceding the filing of the petition, but may take into consideration as a basis for such determination the petitioner's conduct and acts at any time prior to that period."

## CONCLUSION

The decision of the Supreme Court of New Jersey is a correct disposition of an essentially unique factual problem. No conflict of decisions is involved. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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